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Supreme Court of The United States

October Term, 1947

No. 487

ATLANTIC COAST LINE RAILROAD COMPANY, and LOUISVILLE AND NASHVILLE RAILROAD COMPANY, doing business as CLINCHFIELD RAILROAD COMPANY,

Petitioners,

vs.

DOCK L. MEEKS, by next friend, ADA FONEY,

Respondent.

REPLY BRIEF OF RESPONDENT TO PETITION FOR CERTIORARI

MAY IT PLEASE THE COURT:

I.

Certiorari Should Be Denied As The Record Filed By The Petitioners Is Not The Complete Record Of The Trial In The Appellate Courts Of Tennessee.

As appears from the Record in this cause (R. 121-122) the Petitioners served upon Respondent a Praecipe, designating that only Assignments of Error of Petitioners be sent up, and directing the said Clerk of the Court of Appeals of Tennessee not to send up the Briefs or Statement of Fact made

by the Petitioners in the Court of Appeals of Tennessee; and also directing said Clerk not to send up the Reply Briefs of Respondents, filed in said Court.

From this designation it also appears that not all of the petition for Certiorari which the Petitioners filed, seeking to remove the case from the Court of Appeals to the Supreme Court of Tennessee, was included in the record brought to this Court, but only a portion therefrom called, "Assignments of Error."

It further appears that neither of the Briefs filed by the Respondent in either of said lower Appellate Courts was included in the Record brought to this Court by the Petitioners. (R. 121-122, Sections 6 & 7 of Praecipe.)

We submit that it appears to us from an examination of Rule 38 of this Court, that on Petition for Certiorari there is no provision for diminution of the Record by designation, but that the Rule requires the Petitioners' Petition for Certiorari:

> "* * * shall be accompanied by a certified transcript of the record in the case, including the proceedings in the court to which the writ is asked to be directed. * * *"
>
> Rule 38, Supreme Court of United States, Sec. 1.

Rules 11, 12, and 13, of the Court of Appeals of Tennessee, and Rules 14, 15, and 16, of the Supreme Court of Tennessee are substantially the same, and almost word for word.

> Rules of Court of Appeals of Tennessee, 11, 12, and 13, Williams' Code, Vol. 7, p. 546, 549, and 550.
>
> Rules of Supreme Court of Tennessee, 14, 15, and 16, 173 Tenn. 873-878.

The substance of these rules is that in the Court of Appeals the Plaintiff in Error must file Assignments of Error and a supporting Brief, according to those rules; and unless the Assignments of Error is supported by a Brief it will be presumed to be waived, and the Assignments of Error must be preceded by a statement of the case. The Defendant in Error is also required to file a Brief.

Rules 11, 12, and 13, of the Supreme Court of Tennessee regulate the filing of petitions for Certiorari to remove the cause from the Court of Appeals to that Court. (173 Tenn. 872-873.)

The substance of these rules is that the petition for Certiorari shall contain a statement of the case showing prima facie, the error or errors of the Court of Appeals, and it shall be accompanied by an Assignments of Error, in accord with Rules 14 and 15 (above), and a Brief in support thereof, and shall be verified by affidavit (Code of Tenn. 1932, Sec. 10629). The Respondent must then file a Reply Brief in support of the action of the lower court.

Construing these Rules the Courts of Tennessee have held that a Brief may aid an insufficient Assignment of Error, and point out the error made.

Commerce Union Bank v. *Gillispie*, 182 Tenn. 6, 184 S. W. (2d) 37.

It has also been held that the Assignments of Error and the Briefs of the parties in the Court are in the nature of the pleadings of the parties, framed under the rules of the Court.

Wilson v. *Moudy*, 22 Tenn. App. 356, 375, 123 S. W. (2d) 828.
Woods v. *Frazier*, 86 Tenn. 500, 8 S. W. 148.
Cheatham v. *Pearce*, 89 Tenn. 668, 15 S. W. 1080.

Therefore, as the Statement of Fact, Assignments of Error, and Briefs of the parties are the pleadings in the Tennessee Appellate Courts, the Petitioners were required by Rule 38 of this Court to present the same as a part of the Record of the proceedings in the Court to which it is asked the petition for Certiorari be directed.

Thus Rule 38 required Respondent to present the entire Record to the Supreme Court of the United States on petition for Certiorari. If the Petitioner conceives that it is not desirable to print the entire Record, then the Petitioner may treat with the Respondent to see if portions of the Record may be left out in the printing. This is a reasonable requirement, as on a petition for Certiorari this Court must have the entire Record where it is instantly available for reference. If the entire Record is brought and not printed it is still available if reference is desirable. On petition for Certiorari the Respondent has no method of adding to or taking from the Record that will be presented to the Supreme Court of the United States. In an appeal the rules provide that the Appellee may serve a designation as well as the Appellant, and all matters so designated by either party shall be made a part of the Record on appeal, and if by oversight, additional portions of the Record are needed, the Appellate Court may allow addition or order the rest of the Record sent up.

Therefore, it is submitted that Petitioners have not complied with Rule 38, Sec. 1; and that for this reason the petition for Certiorari should be denied.

The petition for Certiorari is further insufficient. The Petitioners fail to present in this Court the full Statement of Fact, Assignments of Error, petition for Certiorari, and Briefs of the parties in the Appellate Courts of Tennessee.

This makes it impossible for Petitioners to comply with Rule 38, Sec. 2, and Rule 12, Sec. 1, of the Supreme Court of the United States. The Record, as presented, can only show the action of the Tennessee courts, but cannot show how Petitioners presented the question to those courts, when they were presented, nor the position Petitioners took or urged in the lower court.

II.

Statement of Fact

It is desirable, of course, to eliminate all uncontroverted matters. We feel there are two matters which may be eliminated as being uncontradicted. These are (1), that the parties were engaged in interstate commerce, and (2), that the Respondent was injured by the Petitioners' negligence.

It was stipulated that interstate trains move over the tracks of Petitioners, (R. 32, and R. 84), and the uncontradicted proof is that Respondent was working on these tracks as a section hand on the extra gang, on the division from Erwin, Tennessee, to Dante, Virginia, over which both interstate and intrastate trains run.

(Dock L. Meeks, Q. 15-18, R. 42, and of 24-31, R. 43).

Pederson v. *Lackawanna & Western R. Co.* 229 U. S. 146, 33 S. Ct. 650, 57 L. Ed. 1125, Ann. Cas. 1914 C. 153. A section hand who works on tracks traveled by interstate trains is engaged in interstate commerce.

As to negligence averred and proved, the Respondent testified without contradiction that:

1. No lamp had ever been in his car since he had been employed and they had used this "tunnel torch" or "flambeau", which was furnished by Petitioners for their use, all the time.

(Dock L. Meeks, R. 61-63, XQ, 90-107, R. 51-52).

2. That Angelo Jackson lighted it on the night of the injury and then sought to fill the torch with the substance furnished by Petitioners, and it exploded; and Jackson, seeking to save himself, pitched the torch onto the floor, where it burst upon and burned the Respondent.

(Dock L. Meeks, R. 45-47, Q. 55-73).

3. Respondent smelled gasoline and knows the smell of gasoline, and there was gasoline in the can instead of kerosene.

(Dock L. Meeks, R. 47, Q. 77-83. R. 63, XQ. 110-113).

4. "Tunnell torches", or "flambeaus", are to be used only for outside work for safe usage, according to this proof.

(Dock L. Meeks, R. 62-63, XQ. 104-107).

5. The railroad furnished both the torch and the fluid to be used in it, and this was Respondent's only source of light for four months.

(Dock L. Meeks, R. 64-65, RQ. 1-18).

6. Angelo Jackson was 15 at the time, and was employed by Petitioners.

(Dock L. Meeks, R. 65, RQ. 19-20).

7. It was not a safe place.

Bailey v. *Cent. Vt. Ry. Co.*, 319 U. S. 54, 63 S. Ct. 1062, 64, 87 L Ed. 144).

8. Petitioners did not deny this proof, and the inference to be drawn in a civil case where the Petitioners refuse to testify or introduce witnesses, is that their testimony would be favorable to the Respondent.

Kirby v. *Talmadge*, 160 U. S. 379, 16 S. Ct. 349. *Standard Oil Co.* v. *State*, 117 Tenn. 618, 672, 100 S. W. 705.

9. The car, torch, fluid, Respondent, and other employees were under control of Petitioners.

Therefore, we have eliminated, and shown that two matters certainly exist.

1. Petitioners were engaged in interstate commerce, and employed Respondent in duties directly, closely, and substantially furthering interstate commerce, and his duties were wholly such; and,

2. Respondent was injured by negligence of the Petitioners.

Only one other element is necessary to bring the action within the coverage of the Federal Employers' Liability Act, and that is that we show that Respondent was an employee of Petitioners at the time he was injured. Perhaps this is the primary point, but as it is the only fact really argued by Petitioners, we have left it to this portion of the Brief.

The facts of the case, as stated by the Petitioners, have been made in the light of the Petitioners' interpretation of the Respondent's testimony, and the testimony of the respondent's witnesses. Therefore, we feel a statement of

fact should be made by us and, as we have already stated the facts of negligence, this statement will deal largely with the relationship between the Respondent and Petitioners, with reference to his contract of employment with the Petitioners, his duties for the Petitioners, and the benefits to be conferred on the Respondent by that contract, and the general conduct of the parties during Respondent's employment.

1. Respondent was a colored boy 17 years of age at the time of the injury, and is now 18 years of age. Angelo Jackson was 15 years of age, and is now 16.

(Dock L. Meeks, R. 42, Q. 7-9; R. 65, RQ 19-20).

2. Respondent's home is at Union Mills, North Carolina, 120 miles from Johnson City, Tennessee.

(Ada Foney, Q. 5-8, R. 41).

3. Respondent had worked at this occupation since September or October, 1945, a period of about 3 or 4 months.

(Dock L. Meeks, R. 56, XQ. 15).

4. Respondent worked as a section hand from Erwin, Tennessee to Dante, Virginia, on this division of the road.

(Answer of Petitioners, R. 7-8, Sec. VI of answer; Dock L. Meeks, R. 42, Q. 15-18; R. 43, Q. 26-27).

5. The Petitioners furnished "Shanty cars", or "bunk cars" for the employees of the extra gang to sleep in. These cars were transported from place to place on the division as occasion demanded. The cars had bunks. There were white and colored cars, and each employee was assigned a bunk.

A cook car was furnished, and the employees were charged 30c per meal at the cook car, and this was taken from their pay. The employees furnished their own linen.

(Dock L. Meeks, XQ 79-85; R. 51, Q. 138-144; Answer of Petitioners in Workmen's Compensation suit, R. 7, Sec. V).

6. In the week immediately preceding this injury, the gang of which the respondent was a member, worked on the first day of the year of 1946, and were able to get in 40 hours by Thursday night at 6 o'clock P. M.

(Dock L. Meeks, R. 63-64, XQ. 115-124).

7. Respondent was on call at all times, in the event of a wreck or any unusual demand upon the repair forces of the railroad. The extra gang worked anywhere on the division, and were shifted around by freight engines.

(Dock L. Meeks, R. 43-44, Q. 24-44; R. 53, Q. 170-175; R. 76-77, Q. 116-130).

"170. Q. Now Dock, at all times you were employed by the railroad, were you subject to call at all times?

A. Yes.

Mr. Taylor: We object to that because it is leading, if Your Honor please.

The Court: He said he was.

The Witness: Yes, I was subject to call.

171. Q. (By Mr. Bralley) You say your duties were this extra gang:

A. Yes.

172. Q. Extra force?

A. Yes, if anything was to be done on the railroad.

173. Q. What was your understanding of this employment, if they had a wreck what would occur, if anything?

A. We would be in bed at night, don't care when it is in the night, if you have a wreck up there, they would come around, wake us up to go to work.

174. Q. What did you do?

A. Get up and fix it.

175. Q. Fix the track?

A. Yes, sir."

8. The Petitioners offered to those who desired, transportation home over the weekends, but the respondent, or any member of the extra gang, was expected, under the contract of employment, to stay in the cars over the weekend, and several other employees of the extra gang who had similar rights and were similarly employed, stayed there over the weekend.

(Dock L. Meeks, R. 51, Q. 132-137; R. 65-66; RQ. 22-24; R. 50-51, Q. 112-133).

9. Respondent came in and was advised by one of the workmen that he could get his check early by going to Erwin after it, and with another boy he went to Erwin. Respondent wanted his check so he could get ready and go home on Friday, but was unable to get the check until train time, when the foreman arrived and got the checks and distributed them. This was on Friday morning, and when Dober, the foreman, gave him his check he could not get ready to go home before time for the train to leave, and consequently Respondent was compelled to wait and try to go home on the following day.

(Dock L. Meeks, R. 45, Q. 50-52; R. 49, Q. 102-104; R. 56-58, XQ. 11-48).

10. After he missed the train at about 11 A. M., because he was unable to get his check in time to get ready to go home, the Respondent shopped at the Unaka Stores, the railroad store in Erwin, visited in Erwin, and came by bus to Johnson City, arriving about 5:00 P. M., attended a show, and then went to the railroad yards, to the shanty car provided for him and to which he was assigned, and entered the car about 10:00 or 10:30 P. M.

(Dock L. Meeks, R. 58-60, XQ. 49-86).

11. When the boys entered the car, there were no lights and the Petitioners had not provided lamps of any type for lighting purposes, but had provided a "flambeau" or "tunnel torch", used in outside work, and they lighted this and it did not burn well. Angelo Jackson started to refill it from the can of oil provided for that purpose. As he poured the substance from the can, the torch exploded, and he threw the torch from him. It landed on and exploded on the Respondent, burning him very severely. The liquid in the oil can was gasoline instead of kerosene.

(Dock L. Meeks, R. 45-47, Q. 55-73).

12. There was no lamp in the car, nor had there been one for the duration of the time Respondent had worked.

(Dock L. Meeks, R. 61-63, XQ. 91-113).

13. Respondent was not discharged nor fired on Thursday, January 3, 1946.

(Dock L. Meeks, R. 54, Q. 179-180).

14. Including the Respondent, there were at least five members of the gang in the car the night Respondent was injured.

(Dock L. Meeks, R. 50-51, Q. 113-138).

15. The Respondent was injured in the railroad yards of the Petitioners, and in the car furnished by the Petitioners to Respondent and others, in which they were to live and sleep while working for the Petitioners, which car was furnished and owned by the Petitioners. The Record does not show who was directly in charge of the extra gang and the men in the cars while Gus Dober, regular foreman, was away. However, it is a reasonable conclusion that this would have appeared had Petitioners put on proof. As the cars and equipment were in the yards, and the men in the cars were subject to call, it is a reasonable deduction that all were subject to the will of the employer during all times they were in the cars.

(Dock L. Meeks, R. 44, Q. 32-47; R. 52, Q. 150-155; R. 55, XQ. 3-5).

16. The whole work of the Respondent for Petitioners was in furtherance of interstate commerce.

(Stipulation, R. 32; Sec. VI, Answer of Defendants, R. 7-8).

17. The Petitioners were in Court, had announced ready for trial, and had their witnesses present. At the conclusion of the Respondent's testimony, the Petitioners rested. The Petitioners offered no proof and the Respondent is entitled to the presumption of law that, had the Petitioners offered proof, it would have shown matters against the interest of the Petitioners, and would have borne out the Respondent's contentions with reference to his claim.

(*Kirby* v. *Talmage*, 160 U. S. 379, 16 S. Ct. 349).

18. After resting the Petitioners moved the Court for a directed verdict.

(R. 69-70).

The Petitioners did not demur to the evidence.

SUMMARY OF ARGUMENT.

I.

Matters Not In Issue

We agree with counsel for Petitioners that the substantive rights of the parties are governed by the interpretation placed on the Federal Employers' Liability Act by the Federal Courts.

Bailey v. *Cent. Vt. Ry. Co.*, (April 1943) 319 U. S. 350, 87 L. Ed 144, 63 S Ct., 1062-1063.

We further agree that the words "employer" and "employee" as used in the Federal Employers' Liability Act are declared to have been used in their natural common-law sense by Congress, and are intended to describe the conventional relationship of employer and employee, or master and servant.

II.

We submit that the 1939 amendment to the Federal Employers' Liability Act materially changed it, and extended the coverage of the Act to the point that it now becomes immaterial what the employee is doing at the moment of his injury if he is an employee whose duties "* * * shall be in the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially affect such commerce as above set forth shall, for the purposes of this chapter be considered as employed by such carrier in such commerce and shall be entitled to the benefits of this chapter."

45 U. S. C. A., Sec. 51.
Ford v. *L. & N. R. Co.*, (Mo.) (Sept. 1946) 196 S. W. 2d 163-8.
Wright v. *N. Y. Cent. Ry. Co.*, 288 N. Y. 719, 43 N. E. 97 Aff. 263 App. Div. 461, 33 N. Y. S. 531.
L. & N. Ry. Co. v. *Potts*, 178 Tenn. 425, 158 S. W. (2d) 729.
Agustino v. *Penn. R. Co.*, 50 Fed. Sup. 726, 729.
Senate Judiciary Report No. 661.

III.

The mere fact that only the Respondent introduced proof does not justify the trial court in withdrawing the case from the jury. Moreover, under Tennessee practice and procedure, a motion for a directed verdict which is not granted, does not take the case from the jury.

Gulf Ref. Co. v. *Huffman*, 155 Tenn. 580, 297 S. W. 199.
Lavender v. *Kurn* (1946) 327 U. S. 645, 66 S. Ct., 740.
Osborne v. *City of Nashville*, 182 Tenn. 197, 185 S. W. (2d) 510.
Hall v. *Nash* (1947) —— Tenn. ——, 198 S. W. (2d) 649.
19 Tenn. Law Rev. 981.

IV.

The Respondent was an employee of Petitioners at the time he was injured, as the relation of master and servant is not interrupted by the end of actual working hours, but continues so long as the employee is on the employer's premises and engaged in actual or incidental duties of the contract of his employment, or while he is using a facility furn-

ished him as a part of his contract of employment on the master's premises, or while he is subject to the control of the master, or while he is exposed to a risk peculiar to the contract of employment and on the employer's premises.

36 A. L. R. 906.
Orman v. *Salvo* (C. C. A.) 117 F. 223, 235.
Moore **v. *Minneapolis & St. L. R. Co.*, 123 Minn. 191, 142 N. W. 152, 154.**
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Brown's Adm. v. *N. & W. R. Co.*, 12 Fed. (2d) 319, 321.
Chicago M. St. P. N *P. R. Co.* v. *Kane*, (9 CCA) 33 F. (2d) 866.
Northwest P R. Co. v. *Industrial Accident Commission*, —— Cal. ——, 166 P. (2d) 334.

V.

Angelo Jackson was in the same status as an employee as the Respondent, but his real status is a non-essential point, as the negligence of the Petitioners, even though coupled with his act, is the causative negligence which injured the Respondent.

Tiller v. *Atlantic Coast Lines R. Co.*, (Feb. 1943) 319 U. S. 54, 63 S. Ct. 444, 446-7.

VI.

The matter of the trial judge trying the case Respondent filed under the Compensation Act of Tennessee, while also trying the case filed under the Federal Employers' Liability Act, is a matter of State procedure and practice that has already been approved by the Court of Appeals and the Supreme Court of Tennessee, and we do not think that State procedure can be attacked in this Court.

R. 82-93, unreported opinion of Tenn. Court of Appeals.
R. 95-100, unreported opinion of Supreme Court of Tenn.
Chesapeake & Ohio R. Co. v. *De Atley*, (1916) 241 U. S. 310, 60 L. Ed. 1016, 36 S. Ct. 564.
12 A. L. R. 715.

BRIEF AND ARGUMENT

Reply To Specifications Of Error, Numbers 1 and 2

We submit to the Court, considering the words "employee" and "employer" in their natural common law sense, that the relationship of master and servant is not interrupted by

the end of actual working hours but continues so long as the employee is on the employer's premises and engaged in actual or incidental duties of his employment, and that injuries to the employee, living on the employer's premises, which are reasonably attributable to or incidental to the nature of his employment or the conditions under control of employer under which employee lives in carrying on his employment, are within the contract of employment, and further, that where the contract of employment includes the provision that the employee shall receive certain benefits from the employer, such as living in shanty cars, being carried to work, or being transported, etc., the employment is not terminated while the employee is receiving these benefits, but continues until the full agreement or contract of employment has been performed.

We feel that Petitioners do not make a correct statement of the law when they say:

> "In order, therefore, for a person to come within the purview of the Act, as amended, it is necessary for such person to be 'employed by such carrier in such commerce' at the time of his injuries, or engaged in matters incidental to his employment in interstate commerce." (Pet. Brief, 31).

Prior to the 1939 Amendment this assertion was true. However, since the Amendment of August, 1939, to Title 45 U. S. C. A, Sec. 51, the law is materially changed and the coverage extended to every employee of the interstate carrier *"any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially affect such commerce as above set forth shall, for the purposes of this chapter, be considered as employed by such carrier in such com-*

merce and shall be entitled to the benefits of this chapter."

Since the 1939 Amendment it is immaterial what the employee was doing when injured, the real question being whether "any part" of employee's regular duties furthered interstate commerce.

Ford v. *L. & N. R. Co.* (Mo.) (September 1946) 196 S. W. (2d) 163, 168.

Wright v. *New York Cent. Ry. Co.* 288 N. Y. 719, 43 N. W. 97 aff. 263 App. Div. 461, 33 N. Y. S. 531.

L. & N. R. Co. v. *Potts*, 178 Tenn. 425, 158 S. W. (2d) 729.

Agustino v *Penn R. Co.*, 50 Fed. Sup. 726, at 729:

> "The weight of authority is to the effect that the Amendment should be liberally construed so as to extend the protection of this Act to all employees, any part of whose duties furthered or affects interstate commerce 'in any way.'"

The Agustino case cites some 50 cases in reaching the above conclusion. (See 50 Fed. Sup., pages 728-729).

Chief Justice Taft speaking for the Court said committee reports and explanatory statements of members of Congress in charge, made in presenting a bill for passage, have been held to be a legitimate aid to the interpretation of a statute when its language is doubtful or obscure.

Duplex Co. v. *Deering* 254 U. S. 443, 475; 41 S. Ct. 172, 65 L. Ed. 349 (16 A. L. R. 196).

The amendments of 1939 to the Federal Employers' Liability Act (53 U. S. Stat. 1404) were embodied in Senate Bill 1708. When that bill was reported by the Committee on the Judiciary, the report was printed (Report 661). It set

forth the bill in full. It included the sections of the old statute (35 U. S. Stat. 65) which were amended and the amendments were set forth in italics. The amendment to Sec. 1 was as follows:

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance in interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purpose of this Act, be considered as being employed by such carrier in such commerce, and shall be considered as entitled to the benefits of this Act and of an Act entitled 'An Act Relating to the Liability of Common Carriers by Railroads to their Employees in Certain Cases (approved April 22, 1906) as the same has been or may hereafter be amended.'"

Objectives of the Bill—

> "It is the aim of the Bill to amend the Employers' Liability Act in three particulars:
>
> "1. It broadens and clarifies the law in its application to employees who may be killed or injured while in the service of a railroad company engaged in interstate or foreign commerce." * * *
>
> "Amendment to Sec. 1.
>
> "This amendment is intended to broaden the scope of the Employers' Liability Act so as to include within its provisions employees of common carriers who, while ordinarily engaged in the transportation of interstate commerce, may be, at the time of injury, temporarily divorced therefrom and engaged in intrastate operations. The question whether an employee, at the time of his injury, is engaged in interstate or intrastate commerce is frequently difficult of determination. Under the rule laid down by the

Supreme Court of the United States, an employee of a railroad company who may be injured must be found to have been engaged, at the time of the infliction of the injury, in interstate transportation, or in work so closely related to it as to be practically a part of it.'

Shanks v. *Delaware, L. & W. R. R. Co.* 239 U. S. 556.

"In order to prove interstate transportation, if the question is at all obscure, it is necessary to procure the records of the carrier to show that the train, or car upon which the employee was working, at the time of the injury, contained some commodity, which was being transported in interstate commerce, or, if the car be empty, it is necessary to prove by the records of the company that the car was then en route in an interstate movement.

"As a result of the uncertainty which exists in borderline cases, there have been many instances in which suits were commenced and prosecuted to a final determination, only to develop the fact that the claimant had chosen the wrong remedy, or sued in the wrong court, and during the acquirement of this information the statute of limitations ran against his claim and no recovery could be had.

"Railroad men are frequently injured while moving or working upon cars or engines which have been temporarily withdrawn from interstate commerce and which were, just before or just after the injury, used in such commerce. In railroad switching service particularly, men may be engaged in interstate and intrastate commerce intermittently several times during a single tour of duty.

"The adoption of the proposed amendment will, to a very large extent eliminate the necessity of determining whether an employee, at the very instant of his injury or death, was actually engaged in

> the movement of interstate traffic. If any part of the employee's duties (at the time of his injury or death) directly, closely, or substantially affected interstate or foreign commerce, the claimant would be considered entitled to the benefits of the Act."
>
> "The preponderance of service performed by railroad transportation employees is in interstate commerce. As to those who are constantly shifting from one class of service to another, the adoption of the amendment will provide uniform treatment in the event of injury or death while so employed."

Thus, the test, since August 1939, is not what the employee was doing at the time of the injury, but whether or not "any part" of the employee's duties are in "furtherance * * * or directly, or closely and substantially affect such commerce." If they do, then the rights of the employee are determined and are to be governed by the Federal Employers' Liability Act.

We also call the attention of the Court to the cases cited in the opinion of the Tennessee Court of Appeals (R. 87-90), and the opinion of the Supreme Court of Tennessee (R. 95-100), wherein additional authority to the same effect is cited by these courts.

Employment Contract, When Oral, Is For The Jury

The question of whether or not the Respondent was an employee of Petitioners, since he was employed under an oral contract of employment, was to be determined by the trier of fact from what the parties said in the contract of employment and the course of dealings between Respondent and Petitioners as shown in the proof.

Gulf Ref. Co. v. *Huffman*, 155 Tenn. 580, 582, 297 S. W. 199.

This case is quoted from an opinion of the Tennessee Supreme Court. (R. 99):

> "However, the main reliance is upon another ground. The Petitioner, Gulf Refining Company, insists that the truck was owned and its driver employed and controlled, not by it, but by one Overall, whose relation to it was that of an independent contractor; that the terms of its engagement of Overall were set out in a writing introduced; that the trial court erred in failing to hold this instrument to be determinative and in failing to construe it and instruct the jury as to its conclusive effect; that the question of the relations between the Company and Overall was thus one of law which should not have been submitted to the jury."
>
> "The trial judge and the Court of Appeals found that there was such evidence introduced of circumstances, conditions and relations, outside of the writing between the parties, as called for a submission to the jury of this practically controlling question. In this we concur."

We have read the case of *Reading Ry. Co.* v. *Hancock*, and *Brady* v. *So. Ry. Co.* (Brief of Petitioners, p. 27), wherein Petitioners urge that the trial court should have decided the question of whether or not Respondent was an employee at the time of the injury. However, we do not believe that those cases hold this. The Brady case holds that it is a Federal question whether or not there is sufficient evidence to go to the triers of fact, and this is controlled by Federal interpretation. *Reading Ry. Co.* v. *Hancock*, holds that where facts are stipulated the deductions and conclusions are for the Court. But that was a case decided under Federal Procedure.

In the case at bar the jury is the trier of fact. Petitioners moved the trial court to direct a verdict in their favor. (R.

69-70). Petitioners would be entitled to have this motion granted only if there was a complete absence of probative testimony in favor of Respondent's contentions. If the trial court did not err in overruling that motion, then there is no error, for such a motion does not take the case from the jury, under Tennessee procedure.

Looking for that interpretation, what evidence should be submitted to the jury, we find the case of *Lavender* v. *Kurn* (March 1946) 327 U. S. 645, 66 S. Ct. 740. This case is one where the Supreme Court of Missouri reversed a decision of the trial court on the ground that the evidence was insufficient to go to the jury. On certiorari the decision of the trial court was reinstated, the Supreme Court saying:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fairminded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the Court might draw a contrary inference or feel that another conclusion is more reasonable."

We regard this as practically the same rule as adopted in the case of *Osborne* v. *City of Nashville*, 182 Tenn. 197, 185 S. W. (2d) 510, which is cited in the opinion of the Court of Appeals.

The argument of Petitioners that because the Respondent only introduced proof, the case should have been decided by the trial court as the facts were uncontradicted, is erroneous under the rules of either Federal procedures or of this State. In no case can the trial court take a case from the jury if the evidence is such that fairminded men may draw different inferences from it, and in either practice, if the evidence be uncontradictory the court may decide the case only if the party in whose favor the evidence preponderates should move for a directed verdict or the opposing party demurred to the evidence.

In support of this statement, insofar as the State procedure is concerned, see the case of *Hall* v. *Nash* (1947) — Tenn. ——, 198 S. W. (2d) 649; also see 19 Tenn. Law. Rev. 981, a case note wherein the following statement is made:

> "The right to grant a motion for a directed verdict is to be exercised only when, after giving to plaintiff's testimony its full scope and indulging in all favorable and legitimate inferences therefrom, there is no substantial evidence to support a verdict for the plaintiff. A prayer for a directed verdict for the defendant for want of evidence supporting plaintiff's case must be rejected if a rational mind could find for plaintiff under the evidence. Where there is any credible evidence supporting an inference, the question as to what is the proper inference to be drawn therefrom is for the jury. Where the evidence will admit of different reasonable inferences, it should be submitted to the jury.
>
> "Indirect and circumstantial evidence of negligence and sufficient proof of other definite facts from which negligence may reasonably be inferred will present a jury question as to negligence, despite lack of positive and direct evidence of an eyewitness. If there was any evidence tending to prove

acts of negligence complained of, the trial judge had a duty to submit question to jury. When more than one rational conclusion can be drawn from evidence by reasonable men, the question of contributory negligence is one of fact and not of law."

See also Federal Rules of Civil Procedure, Rule 50.

Blair v. *B. & O. R. Co.*, (January 1943) 323 U. S. 600, 65 S. Ct. 545, said:

"To deprive railroad workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief Congress afforded them."

Tiller v. *Atlantic Coast Line R. Co.* (February 1943) 318 U. S. 54, 65 S. Ct. 444, 451 (Headnote 10):

"No case is to be withheld from a jury on any theory of assumption of risk, and questions of negligence should under proper charge from the court be submitted to the jury for their determination."

The foregoing case also holds the 1939 Amendment to the Federal Employers' Liability Act completely obliterated the doctrine of assumption of risk, and no doctrine of non-negligence would be substituted for it.

Therefore, under these cases we say that the procedure in either State or Federal Court requires the submission of the case to the jury on the evidence. From a procedural standpoint the court could not take the case from the jury as Respondent did not move for a directed verdict in his favor, nor waive his demand that the jury try the issues.

Respondent When Injured Was An Employee

Respondent was an employee at the time of his injury as he was engaged in acts incidental to his employment. Respondent was injured on the premises of the employer, subject to employer's control, where he had a contractual right to be and to receive a benefit, namely, a place to sleep. He was injured by an instrumentality furnished by the employer and the risk arose by reason of the peculiar conditions of the employment, imposed by the demands of the employer upon the railroad "extra gang" employees.

As heretofore stated, "employer" and "employee" are used in the Federal Employers' Liability Act in their natural sense, and as all employees are covered by the Act if any portion of their duties in any way directly or closely and substantially affect interstate commerce, it is now necessary to determine whether or not Respondent was an "employee" * * * as used in its natural sense * * * at the time of the injury.

As a general statement we find in 36 A. L. R. 906:

> "It is uniformly held that the relation of master and servant is not interrupted by the end of actual working hours, but continues so long as the employee is on the employer's premises and engaged in actual or incidental duties of his employment or subject to the employer's control."

The foregoing citation covers cases from nineteen jurisdictions and the Federal Courts of the United States, as supporting the foregoing statement. Also there are several cases we believe sufficiently in point to be further digested as they deal with factual situations similar to the case at bar:

Orman v. *Salvo* (C. C. A.) 117 F. 223, an employee in a railroad construction camp, asleep in a tent furnished by his employer, was injured by a rock thrown upon the tent

by the blasting during the progress of the work. Employee was allowed to recover for his injuries. The Court said:

> "The master, who had furnished him this lodging, located at a place made dangerous by the discharging of blasts in conducting the master's business, owed him the duty of giving him timely warning, to enable him to avoid the danger."

Moore v. *Minneapolis & St. L. R. Co.* 123 Minn., 191, 142 N. W. 152, 154: It is held a brakeman may recover for injuries sustained in railroad yards while on his way to get his evening meal. He had remained in the caboose to sleep, although off duty until called for his next run. The Court said:

> "There was clearly an invitation to the men to use this car for sleeping purposes as an incident to their employment. In such case they are employees while upon said car and necessarily going to and from the same."

Moyse v. *Northern P. R. Co.* 41 Mont. 272, 108 P. 1062: A freight conductor off duty, but required to be within call, went to sleep in a caboose in the railroad yards. He was injured because the brakes on the caboose were not set properly and it rolled into an excavation. The Court held that as he was to be within call, he was therefore in the discharge of his duty; and that the defendant was required to use ordinary care to furnish a reasonably safe place for the use of the plaintiff and to maintain it in that condition. Recovery allowed under common law but not Federal Employers' Liability Act, as his services "at the time of the injury" were not interstate. Case was decided before 1939 Amendment.

St. Louis A. & T. R. Co. v. *Welch,* 72 Tex 296, 10 S. W. 529: A foreman of a bridge repair gang was sleeping in a bunk

car which was struck by a train, injuring foreman. Foreman was subject to orders to go out on duty at any time. The Court held that the plaintiff was a fellow servant of the employer, the Court saying:

> "We think he must be held to have been upon duty at the time he received the injury. That he was resting from his labors, we think makes no difference."

International & G. N. R. Co. v. *Ryan*, 22 Tex. 565, 18 S. W. 219, 221: Bridge repair gang carpenter off duty was sitting in his bunk car writing a letter at night. He paid 66-2/3 cents per day for board. The car was run into by a switch engine and he was injured. The Court held that the plaintiff and employees in charge of the engine were fellow servants, saying:

> "He was, in contemplation of law, in the employment of the company at the time of the collision. His presence in the car on the sidetrack at the time of the collision can be explained in no other way under the proof. It was only by reason of the fact that he was an employee of the company that he was in the car on the sidetrack at the time he was injured."

Ill. Cent. R. Co. v. *Panebiano*, 129 Ill. App. 1: A track repair gang lived, ate, cooked, and slept in boarding-cars, which were provided by appellant for that purpose. The men furnished and cooked their own provisions, and appellant had no connection therewith. Appellee was ill and did not go to work. In the afternoon he prepared to bake bread, and about four o'clock he put his dough upon a board, got out of the car on the west side and started under the car with the dough, intending to go to the oven and bake it. A switch

engine struck the car, injuring plaintiff. Plaintiff sued, recovered, and defendant appealed. The Court said:

> "There is no merit in the contention that appellee was not in the employ of the appellant because he happened not to be working that day. *Heldmair* v. *Cobbs*, 195 Ill. 172 (62 N. E. 853). He was in the regular employ of appellant; was paid monthly when the pay-car came along; and was furnished by appellant with a car in which to cook, eat, sleep, and live for months at a time. The relation of employer and employee, and the right of appellee to occupy the car did not cease because of his temporary absence from work on account of his illness. * * * The company furnished these cars in which the men should sleep, and stoves upon which they should cook, and dishes for their table, and a foreman who lived with them, and *we consider it altogether too narrow a construction for the relations between appellee and appellant to say that it had no responsibility for or control over the men except during the hours when they had shovels, picks, and spades in their hands.*"

Considering these cases, it is clear that under these cases *the relation of "employer" and "employee" is not terminated or interrupted so long as the employee is on the employer's premises, within the express or implied contract of employment, and exposed to dangers incidental to the employment, or is engaged in any act which is actual/or incidental to the duties of his employment or subject to the employer's control.*

Respondent was employed; never discharged; was in the shanty car where his contract of employment provided he was to sleep, which was a benefit of his contract of employment; was on the premises of employer, within the control

of the employer, and subject to call at any time; and Respondent was exposed to a danger incidental to his work by sleeping in an unsafe place provided by his employer; and the Respondent had not been discharged, and employer knew Respondent was in the shanty car. We respectfully insist that the Respondent was an employee of Petitioners when injured.

Petitioners cited three cases dealing with decisions of the Tennessee Court under Workmen's Compensation decisions. Each was not in point because the employee was off the premises of the employer and injured by negligence of his own, or a third party, and not by the negligence of the employer. However, most of the modern decisions touching the relation of "employee" and "employer" now arise under these Acts, and an examination of some of these cases if informative as "employee" as used in the Acts refers to the common law or general relations of "employer" and "employee." Recovery can be allowed only where employee is such when injured, and the injury *arises out of and in the course of employment.*

Exhaustive annotations dealing with the injury to servants who live on employer's premises as a part of their contract of employment, under Workmen's Compensation Acts are digested in:

31 A.L.R. 1251
56 A.L.R. 512
158 A.L.R. 607

In all of these annotations it is stated that the general rule is:

> "Injuries to employees living on the employer's premises, reasonably attributable or incidental to the nature of his employment, or the conditions un-

der which he lives in carrying on his employment, have been held to be within Compensation Acts as arising out of and in the course of employment."

31 A. L. R. 1251-53.

"Such accidents have also frequently happened to workmen living at bunk houses, cabins, and tents, that have been provided by their employers, and the test as to whether they are entitled to compensation has generally been whether they were reasonably required or expected to do what they were doing at the time of the accident."

31 A. L. R. 1254.

The Tennessee Courts follow this rule.

Employer's Liability Assurance v. *Warren*, 172 Tenn. 403, 112 S. W. (2d) 837:

"It overlooks the facts that it was necessarily within the contemplation of the parties, his employer and himself, that there would be periods of rest and times for food and sleep, from day to day, as essential incidents of his occupation. * * * The *yardstick of the contractual service of the employee measures alike the contractual obligation of the employer for compensation.*"

Carter v. *Hodges*, (1939) 175 Tenn. 96, 132 S. W. (2d) 211:

"Such acts as are necessary to the life, comfort, and convenience of the servant while at work, though strictly personal to himself, and not acts of service, are incidental to the service, and injury sustained in the performance thereof is deemed to have arisen out of the employment. A man must breathe and occasionally drink water while at work. In these and other conceivable instances he ministers unto himself, but in a remote sense (these) acts

contribute to the furtherance of his work. That such acts will be done in the course of employment is necessarily contemplated, and they are inevitable incidents. Such dangers as attend them, therefore, are incident dangers. At the same time injuries occasioned by them are accidents resulting from the employment."

Vaughn v. *Standard Surety & Casualty Co.* (1944) 27 Tenn. App. 671; 184 S. W. (2d) 556:

> "While no express contract for transportation was made with complainant, there was testimony that he knew and expected that he would be transported by his employer in these trucks from McMinnville in the morning to the job where he would work, and from the job in the afternoon back to McMinnville."
>
> "It is not reasonable to suppose that the contracting parties would contemplate that these men would be carried in trucks a distance of fifty or sixty miles from McMinnville and not returned after the day's work was done. It is true that complainant did not have to avail himself of this means of transportation, but as an actual fact he did avail himself of it."

A person to be within the provisions of the Workmen's Compensation Act of Tennessee must be employed, either by express or implied contract.

> *Cornett* v. *Chattanooga*, 165 Tenn. 563, 56 S. W. (2d) 742.

The contract of the master and servant may be expressed or implied in fact, as shown by a course of dealing between the parties. Where it is apparent to reasonable minds that the employees would be expected or required to do the act

they have done, or that such service was common and necessary by the employer, then such is an implied part of their contract and properly to be said to have been intended by the parties.

It thus appears that the courts have held under the common law and under the Workmen's Compensation Act that an employee who receives lodging, board, and/or other services as a part of his contract of employment, or whose contract of employment exposes the employee, at all times during his employment, to peculiar risks, is within the scope of his employment during such time as he is receiving the board, room, lodging, and/or other services or at such times as he is exposed to risks reasonably attributable to and incidental to his employment.

In citing the cases of the Federal Courts dealing with employment situations somewhat similar to the case at bar, it is to be expected that those courts have applied the above principles of common law to the words "employer" and "employee." However, these cases, before the 1939 Amendment to the Federal Employers' Liability Act, are often limited to the determination of the existence of "*employee engaged in interstate commerce*" instead of "*employee.*"

A general statement of the rule of the Federal Courts prior to the 1939 Amendment is found in *Early* v. *Va. Ry. Co.* 130 Fed. (2d) 548, where the Court said:

> "• • • the scope of the employment includes not only actual service, but also those things necessarily incident thereto • • •".

Philadelphia, B. & W. R. Co. v. *Smith* 250 U. S. 101, 39 S. Ct. 396, 63 L. Ed. 869: The Court held that the Federal Act covered a cook on a repair gang who was neither engaged

in repairing the track nor carrying material for that purpose. The Court said:

> "The work of the bridge carpenters in the present case was so clearly related to defendant's interstate commerce as to be in effect part of it. The next question is what was plaintiff's relation to the bridge carpenters: It may be freely conceded that if he had been acting as cook and camp cleaner or attendant merely for the personal convenience of the bridge carpenters, and without regard to the conduct of their work, he could not properly have been deemed in any sense a participant in their work. * * * *The significant thing in our opinion is that he was employed by the defendant to assist, and actually was assisting the work of the bridge carpenters by keeping their bed and board close to their work,* thus rendering it easier for defendant to maintain a proper organization of the bridge gang and *forwarding their work by reducing the time lost in going to and from meals and their lodging place.*

Brown's Administrator v. *N. & W. R. Co.* 12 F. (2d) 319, 321, 12 F. (2d) 319.

Brook v. *Chicago R. I. & P. R. Co.* 305 Mo. 502, 266 S. W. 691, 36 A. L. R. 891; Cert. Den. 266 U. S. 634, 45 S. Ct. 226, 69 L. Ed. 479: A gang of men living in bunk cars were engaged in repairing a telephone line and had come back to the cars to eat the noon meal. Brook was injured while going across yards for a bucket of water. Recovery allowed under Federal Employers' Liability Act. The Court said:

> "The procuring of water and taking of the meal at the time and place under the circumstances and under the method in force were ancillary to the work done."

Chicago, M. St. P. & P. Co. v. *Kane,* (9 CCA) 33 F. (2d) 866: Here we find a case decided before the 1939 Amendment which dealt with the rights of a section hand at the bunk cars. It seems necessary to us to quote extensively from this case as it is a case decided by Federal Court and a case which is somewhat similar to the facts, and on pages 867-68 the Court said:

> "Inasmuch as there is no exact formula to which the first question can be referred, and every case must be adjudged upon its own facts (*Cudahy Packing Co.* v. *Parramore,* 263 U. S. 418, 44 S. Ct. 153, 68 L. Ed. 366, 30 A. L. R. 532), it is necessary to state in some detail the circumstances. The accident happened at about 6:30 in the morning. Alcazer is not a town or village, but a remote railroad station, where there are side and passing tracks and a section house. From this point appellant was working an extra gang of approximately 120 men in surfacing and dressing its roadbed. *There being no local facilities for boarding and housing the men, provision was made therefor in movable dining and bunk cars, which were set on a side track at the station, and meals were furnished therein by a commissary concern under contract with appellant, by the terms of which the men were to be charged at a specific rate, and at that rate deductions were to be made from their checks and paid to the commissary. There is no question that the track upon which work was being done was a facility of interstate commerce, and indeed, appellant concedes that, had Kane actually entered upon the work prior to the accident, he would have been within the protection of the Liability Act.* It seems that appellant was adding to the gang from day to day men secured through its employment *agencies, and Kane had been so engaged by its agent at Butte.*

"In charge and under the control of one of appellant's agents *he, with* five or six others employed in like manner, *was taken on board one of appellant's passenger trains,* and without charge was carried to Alcazer, *reaching his destination sometime in the evening of September* 14th. Being advised that six or seven men were being sent for this service, the foreman of the gang was at the station to meet them upon the arrival of the train. They were directed to get off and carry some camp supplies which had come in on the train, to the commissary. *Then all were immediately issued blankets and were assigned to their bunks.* Apparently both the commissary steward and the night foreman participated in giving these orders and making these assignments. The men were informed of the breakfast hour about 6:45, and that they were to go to work at 8 o'clock. Across three tracks, upon the other side of the yard from the bunk and dining cars, were the section house, the water supply, and all toilet facilities. *Just before the breakfast hour, Kane was struck and killed while he was walking across these tracks in an "angling" direction from the bunk cars for the purpose of going to the toilet.* Undoubtedly he was in appellant's employ, and his service was interstate. By the conditions of his employment, he was necessarily on appellant's premises, and was making necessary preparations for the work in which he was to be engaged an hour and a half later, in a reasonable manner and within a reasonable time. *Appellant's contentions seem to be predicated solely upon the consideration that he had not yet lifted a pick or stuck a shovel into the ground.* But his employment was definite, and the nature and place of his service for the day were clearly understood. True, the gang foreman might have discharged him before he did any actual work, or might have assigned him to a different kind of

work, but such authority with respect to the future he would have at any time over any one of the men, regardless of the length of service of such man in the past.

"In contemplation of law, we are of the opinion that, within the principle recognized by us in *Lamphere* v. *Oregon R. & N. Co.* (CCA) 196 F. 336, 47 L. R. A. (N.S.) 1; and *San Pedro, etc.*, v. *Davide* (C.C.A.) 210 F. 870; Deceased was employed in interstate commerce at the time of the accident. In support of this decision we may also cite *Missouri, K. & T. Ry. Co.* v *United States*, 231 U S. 112, 34 S. Ct. 26, 58 L. Ed. 144; *Pederson* v. *Lackawanna & Western Ry. Co.*, 57 L. Ed. 1125. (Case here cites many other cases.) Appellant cites numerous decisions, but we do not find any of them necessarily opposed to the view we have taken. Perhaps those most nearly in point are *Ill. Cent. R. Co.* v. *Welch*, 242 U. S. 303, 37 S. Ct. 116, 61 L. Ed. 319. They both involved the nice distinctions which must often be made where the injured party is engaged in work which may have to do one moment with intrastate and the next with interstate commerce. *But Kane's service was by both parties understood to be in interstate commerce, and nothing else.* (Italics ours.)

As this case indicates, before the Amendment of 1939 to the Federal Employers' Liability Act, where the employee's duties were solely in interstate commerce, according to the agreement of employment, then all incidents of the employment were covered by the Federal Employers' Liability Act. One of these incidents was this danger to which deceased Kane was exposed. True, Kane never actually engaged in any act of his employment, but he was killed by a danger of his employment while receiving a benefit of his contract of employment on the premises of the employer.

In connection with this last statement, which relates to receiving services from the employer, which services were an incident of the contract of employment, and a part of the contract of employment, we find a case decided in March, 1946: *Northwestern P. R. Co.* v. *Industrial Accident Commission* —— Cal. ———, 166 P. (2d) 334, where the railroad brakeman died in an automobile collision. There was a recovery by administrator of deceased employee under the California Compensation Act, which railroad sought to set aside because the deceased was alleged to be in interstate commerce, and, if so, the Federal Employers' Liability Act applied. Held, the award is vacated. The Court said:

> "Said transportation was furnished to the employee by employer as part of the contract of hire and was under the control of the employer and therefore, while using it, the said employee was performing a service in the course of his employment, and said injury arose out of and in the course of the employment."

Therefore, in both State and Federal Courts, (*Kane case and N. W. R. Co.* v. *Inc. Accid. Conn. supra*) *it is held that where the services of the employee are wholly in interstate commerce,* even before the 1939 Amendment, *where the employee is on the premises of the employer and is exposed to danger from the employer while receiving a benefit of his contract of employment the employee is within the coverage of the Federal Employers' Liability Act.*

REPLY TO SPECIFICATION OF ERROR No. 3

Angelo Jackson Was A Fellow Servant At The Time Respondent Was Injured

Argument is made that Angelo Jackson was not a fellow servant. Suffice it to say, this Record shows he lived near Respondent's home at Union Mills, North Carolina, worked at the same job for Petitioners on the same extra gang, under the same contract of employment with the Petitioners, and was assigned a bunk in the same car with Respondent by Petitioners. Briefly, we would say that Angelo Jackson was as much an employee as Respondent. The negligence of Angelo Jackson probably combined with the other negligence of Petitioners, but as said in *Tiller* v. *Atlantic Coast Lines R. Co.* (Feb. 1943) 319 U. S. 54, 63 S. Ct. 444, 446-7:

> *"We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the* 1939 *Amendment, and that Congress by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to "non-negligence."*

Wherefore, whether he be called fellow servant or not, and we feel he is, the negligence of the Petitioners was the cause of Respondent's injury, and Jackson's technical association with Petitioners and the Respondent need not be further argued, as Jackson certainly was not the sole cause of Respondent's injury.

Therefore, we finally come to the only real question: Has the proof, introduced by the Respondent, any probative value, and could reasonable men believe, from this proof, that the Respondent was upon the premises of the employer,

receiving a benefit of his contract of employment, exposed to a danger of this type of employment from negligence of his employer, subject to control of the employer and within the control of the employer, and was this an incident of the contract of employment between employer and employee?

On motion for a directed verdict the trial court said:

> "But it is my opinion that he was in this car, a place where he had the right to sleep, and that it was directly connected with his employment and was incident to his employment; and that this litigation should be proceeded under the Interstate Commerce Act." (R. 70-71)

On appeal, the Court of Appeals, after a full and careful consideration of the facts, said:

> "On the record before us it is shown without contradiction that the place of abode was furnished by the railroad, on their premises, so that they might have the services of these laborers; that it was within the contemplation and undoubtedly of the employer and employee that the employee use this place of abode even though no work was to be done the day following; that these employees were subject to call for work of the employer during the night when they were not in actual service; that it was necessarily incident to the employment to furnish this place because these laborers were recruited from various states and to keep them on the job, a place of abode was provided. It is clearly inferable that on the night of the accident herein, i. e., if the accident had not happened, the plaintiff could have been called to work by the employer if necessity demanded. The instrumentality that caused the injury was furnished by the employer for use of the employees. There is nothing herein to indicate that what the plaintiff did was inconsistent with his duty

> to his employer. It seems apparent that there was material evidence presented to the jury wherein they could find that the relation of employer and employee, or master and servant, existed between the parties at the time of the injury. See 4 Labatts Master & Servant, 4684, section 1556; *Milburn* v. *Chicago M. St. P. & P. Co.* 331 Mo. 1171, 56 S. W. (2d) 80, 69, and authorities there cited." (R. 87)

On petition for Certiorari the Supreme Court of Tennessee said:

> "We are of the opinion that Meeks was an employee of the defendants at the time of the injury, as he was engaged in acts incidental to his employment. He was injured on the premises of the employer and subject to the employer's control, where he had a contractural right to be and receive a benefit, namely, a place to sleep. He was injured by an instrument furnished by the employer, and the risk arose by reason of the peculiar conditions of the employment imposed by the employer; and, further, he was subject to call at any time in case of an emergency or for extra repairs on the tracks of the railroad." (R. 99)

The proof in the case has been held by three courts to show these facts. Probably more conclusions and deductions could be drawn than have been set out, but all inferences, deductions, speculations or conjectures are to be by the triers of fact. *Lavender* v. *Kurn, supra, Hall* v. *Nash, supra;* and *Gulf Ref. Co.* v. *Huffman, supra.* If the trial court did not err in overruling the motion of defendant for a directed verdict, then there can be no merit in this petition for Certiorari.

REPLY TO SPECIFICATION OF ERROR NO. 4

It is urged that the Tennessee Courts erred in allowing the suit filed by Respondent under the Tennessee Compensation Acts to be heard by the trial Judge, while the other cause, filed by Respondent under the Federal Employers' Liability Act, was being heard.

This is a matter of Tennessee State practice and procedure which has been approved by the Court of Appeals and the Supreme Court in that jurisdiction.

(R. 82; and R. 95)

We respectfully submit that although the action is based upon the Federal Statute, local rules of practice and procedure are applicable where it is triable and tried in a State Court.

Chesapeake & O. R. Co. v. *DeAtley* (1916) 241 U. S. 310, 60 L. Ed. 1016, 36 S Ct. 564. 12 A. L. R., 715.

Therefore, in our opinion, this argument is not well taken and this specification of error should be overruled and disallowed.

CRITICISM OF CASES CITED BY PETITIONERS.

Considering the cases cited by the Petitioners to sustain their contentions, we feel that, generally speaking, all Federal cases cited by Petitioners were decided prior to the 1939 Amendment, and turned primarily not upon whether the injured was an "employee" but upon whether, as such employee, he was engaged in interstate commerce at the time he was injured. With due deference we herewith submit

the cases relied upon are subject to be distinguished from the case at bar for the following reasons:

The case of *Bourne* v. *So. R. Co.* 225 N. C. 43, 33 S. E. (2d) 239, turns upon the proposition that the engineer who was killed had a special written permit to ride an engine on another division, for his own purpose. The regular engineer, in absolute and known violation of the rules of the railroad, turned the engine which he was driving over to the deceased engineer, and the regular engineer, also in violation of the rules of the road, went back into the train. Due to deceased engineer's ignorance of the road and negligence in the management of the engine, the deceased engineer caused the wreck in which he was killed. Therefore, that case has no relation to the facts of the case before the Court. Certainly as the deceased was on a permit which was written, and was to receive no pay, it was not a part of his employment. Bourne killed himself. The Bourne case may be sound on its facts. However, its facts and the law applicable to them do not fit the case at bar.

The case of *Pryor* v. *Bishop* (1916) 234 Fed. Rep. 9, 14-15, was decided prior to the 1939 Amendment and turns upon the fact that the employee was not in interstate commerce:

> "If, however, he could be deemed to be in the employment of the company at the time of the injury, nevertheless he was not then actually employed in interstate commerce."

On the second appeal in 1920, *Bishop* v. *Delano* 265 Fed. Rep. 263, the facts certainly were not different. Even though he was an employee, he was not in interstate commerce.

In the quotation from the *Pryor* v. *Bishop* case, *supra*, and in the second appeal, *Bishop* v. *Denalo*, there are statements to the effect that the employee stayed in the caboose at the

turn-around point, and employee knew he could stay there if he so chose, but there was no contractual right in the employee nor duty upon him to stay there. *Pryor* v. *Bishop, supra,* refers with approval to a "Moyse" case, decided before the 1939 Amendment, which is the case of *Moyse* v. *Northern P. R. Co.,* 41 Mont. 272, 100 P. 1062 wherein employee, a freight conductor, was off duty, but required to be within call, and he went to sleep in a caboose parked in the yards. He was injured because the brakes on the caboose were not properly set and it rolled into an excavation. Suit was brought on common law and Federal Employers' Liability Act counts. The Court held that as he was to be within call, he was within the discharge of a duty of his employment, and employee was allowed to recover under the common law, but not under Federal Employers' Liability Act, for though an employee, he was not actively in interstate commerce at the time of his injury. We cited the Moyse case in our Brief to the Court of Appeals.

The Bishop cases, *supra,* are not authority for the position taken by Petitioners that a man is only an employee while using a pick and shovel. The argument of the Petitioners that the Respondent "could stay in the shanty car if he wanted to", is not correct as it insinuates a permissive right. The Respondent proved his right was a contractural right, and that, as a necessity of the employment, he had to stay a long distance from home and stay in a car which could be moved up and down the railroad, and that it was a part of the contract of employment that he sleep in these cars and stay in them, except as at such times as he went home.

(R. 42-44, Q. 17-48; R. 49-51, Q. 105-137; R. 53-54, Q. 170-184).

The case of *Young* v. *N. Y. N. H. & H. R. Co.*, 74 Fed. Rep. (2d) 253, was decided prior to the 1939 Amendment turns upon the question that the Court held all incidents of the injured employee's connection with interstate commerce ended when he reached the point where the fireman should have left the property and cars of the defendant railroad at New Haven. The Court held that a trip to Cedar Hill, some miles from New Haven, was on a mission of his own and not an interstate incident of his employment. The injury occurred on this additional trip.

Karysaik v. *Penn. R. R. Co.* 270 Fed. 738, is a case which turns upon the employee taking a way of convenience from his place of work instead of following the path provided by the employer. Employee was also on his way to his own home.

Brown v. *Pere Marquette R. Co.* 237 Mich 530, 213 N. E. 179, 71 A. L. R. 854 In this case the judgment of the Court was influenced by the fact that the employee was not contributing to interstate commerce Also the employee had stopped the train in a position of danger and refused to put it on a sidetrack because the employee took the position that the time for him to work had expired. Had the employee put the train on the sidetrack, as he probably should have, instead of leaving it on the mail track, the accident would not have occurred.

The citation in 35 Amer. Jur. Sec. 440, page 855, is probably true prior to the Amendment to the Federal Employers' Liability Act. However, as it is no longer material what the employee is doing at the time he is injured by the negligence of the employer or its agents, etc., we would question this authority if the employment contemplated such employees should enjoy this facility at the turn-around point.

The cases of *Little* v. *Johnson City F. & M. Co.*, 158 Tenn. 102, and *Rourke Claimant* —— Mass. ——, 129 N. E. 603, 13 A. L. R. 546, present cases where the employee was injured by a third party away from the place of employment. In the Tennessee case the employee was run over by a car 1,000 feet from his place of employment. In the Rourke case a third party assaulted employee on the street after he had left his place of employment. Therefore, neither is in point.

The case of *Free* v. *Indemnity Ins. Co. of North America*, 177 Tenn. 287, 145 S. W. (2d) 1026, is a case where employee left place of employment to go get groceries. After he purchased groceries, he intended to do a mission for employer. He fell on ice before he reached grocery store. Held, while on way to store he was not in scope of employment. Had he fallen after he left grocery store and returned to his employer's business, he would have been covered by Workmen's Compensation Act.

Toombs v. *Liberty Mutual Ins. Co.* 173 Tenn. 38, 114 S. W. (2d) 785, is a case where claimant was injured off premises of employer on a mission of his own.

In these Tennessee cases, cited by Petitioners, the injury came from a source separate entirely from the employer, and was not caused by employer's negligence nor upon employer's premises; also the employee was not where employer directed him to be, nor receiving of the employer a benefit of the contract of employment; nor was employee subject to control, nor was employee exposed to the particular risk as an incident of his employment.

Petitioners also cite the case of *Brown's Adm'r.* v. *N. & W. Ry. Co.* 12 Fed. Rep. (2d) 319. This is a district court case which was cited by us in our Brief in the Court of Appeals. The holding of this case really appears to be damaging to Petitioners' position. The distinction stated is made be-

tween the Zachary and Karysiak cases, but the Court then said:

> "While the fact that Brown took with him a sack and had put in it a bushel or more of coal affords ground for reasonable inference he was getting coal for use in the kitchen and dining cars, I do not believe the possibility that he was getting the coal for his private use in the bunk car is here of importance. Even if such was his purpose the Zachard case seems to me to control. Brown was employed in interstate commerce, while getting coal for his own use, as much as Zachary's decedent was while going to his boarding house for his own purposes. *Brown's visit to the coal car was not inconsistent with his duty to leave Flat Top on the camp train with the rest of the mason's crew, whether he was after coal for company use or for his own use.*"

CONCLUSION

It is, therefore, submitted that the petition for Certiorari filed in this cause should be denied:

1. Because the Petitioners have not complied with Rule 38, Sec. 1, of the Court, as they did not present the full proceedings in the Court of Appeals of Tennessee.

2. Because the Petitioners have not complied with Rule 38, Sec. 2, and Rule 12, Sec. 1, of the Court, and do not show how the alleged questions were presented in the Appellate Courts of Tennessee, when they were raised, and the position the Petitioners urged upon that Court.

3. Because there was material evidence showing that the Respondent was an employee of Petitioners, and Respondent's duties directly furthered and pertained to interstate commerce, and he was injured by the negligence of the Petitioners.

4. The trial court did not err in submitting the case the jury.

5. Respondent was injured by the negligence of Petitioners and that of a fellow servant, Angelo Jackson. Whether Angelo Jackson was a fellow servant or not is really immaterial as there was active negligence by the Petitioners, combined with the act of Angelo Jackson.

6. The matter of procedure raised by Specifications of Error No. 4 is a matter of State procedure, and is not substantive law.

7. Petitioners have not briefed Specifications of Error Nos. 5 and 6, and therefore they are presumed to be waived and for this reason Respondent has not attempted to brief same.

We, therefore, respectfully submit that each and all of the Specifications of Error made by the Petitioners, are not well taken, and the petition for Certiorari should be dismissed and disallowed, and this action we respectfully request of the Court.

Respectfully submitted,

CLARENCE W. BRALLEY,
Miller-Artz Bldg.
Johnson City, Tenn.
HAWKINS & BRYANT,
By: JOHN FRANK BRYANT,
Peoples Bank Bldg.
Johnson City, Tenn.